QBE INSURANCE LTD.

v.

DR. K. THURAISINGAM

HIGH COURT MALAYA, SEREMBAN
WONG KIM FATT JC
[CIVIL APPEAL NO. 13 OF 1981]
20 JANUARY 1982

INSURANCE: *Action against insurers by third party to recover judgment sum - Judgment against insured for property damage only rights of third party to sue insurers direct - Whether ss. 74(1), 75(3) of the Road Traffic Ordinance 1958, read together with the insurance policy imposed a contractual liability on insurers to indemnify third party - Whether third party had statutory right to sue under s. 80(1) as read together with s. 75(3) of the Road Traffic Ordinance 1958, and insurance policy.*

The appellants, QBE Insurance Limited ("the insurers") were at all material times the insurers of Cheok Beng Seng("the insured"), the defendant in Port Dickson Magistrate's Court C.A. No. 55/78 in respect of motor vehicle No. NH 4122 driven by the insured at 2½ milestone along Port Dickson-Seremban road in the direction of Port Dickson which vehicle had knocked into the rear part of motor car No. BK 9062 driven by the respondent, Dr. K. Thuraisingam, ("the third party") on or about 23 February 1977. The third party as plaintiff in the said Civil Action No. 55/78 obtained judgment by default against the insured on 22 May 1979 in the sum of RM6,300 ("the judgment sum") for property damage with interest and costs, the third party having abandoned his claim for superficial bodily injury. Upon the insurers refusing to pay the judgment sum, the third party brought an action against them vide Civil Action No. 87/79 which is the subject matter of this appeal relying in effect on the insurance policy issued by the insurers and on ss. 75(3) and 80(1) of the Road Traffic Ordinance 1958, ("the Ordinance").

The learned Magistrate held that the insurers were under a contractual liability to pay and gave judgment in favour of the third party on 25 March 1981. The insurers appealed. When the appeal came up for argument on 7 January 1982 learned Counsel for the insurers and the third party agreed that there was no question of vicarious liability on the part of the insurers. There were only two grounds of appeal. The second ground, that there was no contractual liability between the third party and the insurers because the third party is not privy to the contract of insurance was conceded by the learned Counsel for the third party in the course of argument. The only issue that then remained was whether the insurers were liable to satisfy the judgment sum notwithstanding that it was solely in respect of property damages i.e. special damages consisting mainly of the cost of repair to the car and of hiring a taxi while the car was under repair. The learned Counsel for the insurers contended that the judgment was not one in respect of a liability within the meaning and scope of compulsory insurance as provided by s. 80(1) of the Ordinance. The learned Counsel for the third party relied on the insurance policy and on ss. 75(3) and 80(1) of the Ordinance and submitted that ss. 74(1), 75(3) and 80(1) of the Ordinance should be read together with the contract of insurance and that no proper construction, the insurers were liable to satisfy the judgment sum. The outcome of the appeal depended on the interpretation of ss. 75(1) (b) and s. 80(1) of the Ordinance.

Held:

[1] A contract of motor insurance between the insurers and the insured is a contract of indemnity. The insurers will indemnify the insured, not the third party who is not privy to the contract, in the event of a motor accident caused by or arising out of the use of the insured motor vehicle in respect of death or bodily injury to any person or damage to property and the liability must be one covered by the terms of the policy.

[2] The judgment obtained by the third party against the insured is in respect of property damage only. In the circumstances, the third party, by virtue of the provisions of ss. 75(1)(b) and 80(1) of the Ordinance, has no statutory rights to sue the insurers direct for recovery of the judgment sum. A third party at common law may sue only the insured for tort or breach of duty of care if any. Although the insurers had undertaken in the contract of insurance to indemnify the insured, the third party had no right of action against them.

[3] Section 75(1)(b) makes it a statutory compulsion or requirement that a policy of insurance must be one which covers any liability which the insured may have incurred in respect of the *death of or bodily injury* to any third party, caused by or arising out of the use of the motor vehicles on a road, and further, under proviso (ii) thereof, any passenger carried by the insured for hire or reward in public service vehicles, or by reason of or in pursuance of a contract of employment. The object of the legislation is to protect third parties and fare-paying passengers.

[4] Section 80(1) of the Ordinance confers the statutory right to a third party armed with a judgment in respect of the liability that must be covered compulsorily, that is liability in respect of death or bodily injury (which must be liability covered by the terms of the Policy) but not property damage suffered by a third party, to sue the insurers direct for recovery of the judgment sum.

[5] The learned Magistrate erred in law in holding that the insurers were contractually liable to pay the judgment sum to the third party. The learned Magistrate erroneously equated the insurers' undertaking to indemnify the insured with a contract or undertaking to indemnify or pay the third party for property damage sustained by him.

[6] The appeal is allowed and the judgment and order of the learned Magistrate set aside, with costs.

[Appeal allowed with costs here and Court below.]

Cases referred to:
British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd. [1908] 1 KB 1006
New Zealand Insurance Co. Ltd. v. Sinnadorai [1969] 1 MLJ 183

Legislation referred to:
Road Traffic Act 1934 [UK], s. 10(1)
Road Traffic Act 1972 [UK], s. 145
Road Trafffic Ordinance 1958, ss. 74, (1), 75, (1)(b), (3), 80, (1)

Other source referred to:
Halsbury's Law of England, 3rd Edn., Vol. 22, p. 375

For the appellants - S. Radhakrishnan; Shearn, Delamore & Co.
For the respondent - Rajan Rajasooria; Rajasooria & Son

JUDGMENT

Wong Kim Fatt JC:

In this appeal the appellants, QBE Insurance Limited ("the insurers"), were at all material times the insurers of one Check Beng Seng ("the insured"), the defendant in Port Dickson Magistrate's Court Civil Action No. 55 of 1978 (formerly Port Dickson Sessions Court Civil Action No. 24 of 1977) in respect of a motor vehicle No. NH 4122, which, while being driven by the insured at 2½ milestone along Port Dickson-Seremban Road in the direction of Port Dickson, knocked into the rear part of motor car No. BK 9062 driven by the respondent, one Dr. K. Thuraisingam ("the third party") on or about 23 February 1977. The third party as plaintiff in the said Civil Action No. 55 of 1978 obtained on 22 May 1979 judgment by default against the insured in the sum of some RM6,300 for property damage with interest and costs (hereinafter referred to as "the judgment sum"). It is not in dispute that the third party had abandoned, not surprisingly, his claim for his superficial bodily injury in the form of a tender and swollen left knee for which he was asked to take his own treatment. Upon the insurers refusing to pay the judgment sum, the third party brought against them the above Civil Action No. 87 of 1979, which is the subject-matter of this appeal, relying in effect on the policy of insurance issued by the insurers and on ss. 75(3) and 80(1) of the Road Traffic Ordinance 1958, ("the Ordinance"). The insurers contended that they were not liable to pay the judgment sum. In the result, the learned Magistrate held that there was contractual liability on the part of the insurers and gave judgment on 25 March 1981, in favour of the third party, and hence this appeal by the insurers.

When the appeal came up for argument on 7 January 1982, learned Counsel for the insurers and the third party agreed, and quite rightly so, that there was no question of vicarious liability in this appeal on the part of the insurers.

There are only two grounds of appeal. I may for convenience first deal with the second ground, that is there is no contractual liability between the third party and the insurers because the third party is not privy to the contract of insurance, the parties to which are the insurers and the insured. This issue is plain and simple and was conceded by learned Counsel for the third party in the course of argument.

The only issue that remains for my decision is whether the insurers are liable to satisfy the judgment sum, notwithstanding the fact that it is solely in respect of property damage, i.e. special damages consisting mainly of the cost of repair to the car and of hiring a taxi while the car was under repair, and hence, as contended by learned Counsel for the insurers, is not a judgment in respect of a liability within the meaning and scope of compulsory insurance as provided by s. 80(1) of the Ordinance reading as follows:

> 80(1) If, after a certificate of insurance has been delivered under subsection (4) of s. 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of subsection (1) of s. 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Learned Counsel for the third party submits that s. 74(1) and 75(3) of the Ordinance should be read together with the contract of insurance with special reference to s. II 1(b) of the insurance policy, and that, on proper construction, the insurers are liable to satisfy the judgment sum.

Section 74(1) of the Ordinance reads as follows:

> 74(1) Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Ordinance.

Section II(1) of the policy is in the following terms:

Section II - Liability To Third Parties

> 1. The company will subject to the limits of liability **indemnify the insured** (emphasis mine) in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:
>
> (a) death of or bodily injury to any person
>
> (b) damage to property.

Sections 74, 75, and 80 come under Part IV under the heading "**Provisions Against Third Party Risks Arising Out of the Use Of Motor Vehicles**" of the Ordinance. The provisions of s. 75(1) and (3) thereof referred to in the argument of Counsel read as follows:

> 75(1) In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which:
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> (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and
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> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the **death of or bodily injury to** (emphasis mine) any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
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> Provided that such policy shall not be required to cover:
>
> (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> (ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
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> (iii) any contractual liability ...
>
> (3) Notwithstanding anything in any written law a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

I may with respect point out in the first place that a contract of motor insurance between the insurers and the insured is a contract of indemnity. This means that the insurers will indemnify the insured, not the third party who is not privy to the contract, in the event of accident caused by or arising out of the use of the insured motor vehicle in respect of death or bodily injury to any person or damage to property and the liability must be one covered by the terms of the policy. A contract of motor insurance may be said to be one of the common contracts of indemnity known to the law. Other common examples of contracts of indemnity are to be found in fire insurance and marine insurance (see *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 KB 1006, 1014).

The outcome of this appeal depends on the interpretation of s. 75(1)(b) and s. 80(1) of the Ordinance. Section 75(1)(b) makes it a statutory compulsion or requirement that a policy of insurance must be one which covers any liability which the insured may have incurred in respect of the **death of or bodily injury to** any third party, caused by or arising out of the use of the motor vehicle on a road, and further, under proviso (ii) thereof, any passenger carried by the insured for hire or reward in public service vehicles, or by reason of or in pursuance of a contract of employment. Proviso (i) makes it non-compulsory to cover liability for death or bodily injury suffered by any person in the course of his employment with a person insured by the policy, arising out of and in the course of his employment. The object of the legislation is to protect third parties and fare-paying passengers. Whether this protection is adequate under our present law is a matter for Parliament. By proviso (ii) to s. 75(1)(b), liability in respect of passengers travelling in, getting into or out of private motor vehicles is not required by the Ordinance to be covered so that an insured has to pay an additional premium to his insurance company to cover passenger risks or other additional but non-compulsory risks such as war, or strike, riot, and civil commotion.

Section 80(1) of the Ordinance confers the statutory right to a third party armed with a judgment in respect of the liability that must be covered compulsorily, that is liability in respect of death or bodily injury (which must be a liability covered by the terms of the policy), but not property damage suffered by a third party, to sue the insurers direct for recovery of the judgment sum, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, subject, however, to the provisions of this section. These provisions, such as the service of notice on the insurer regarding the commencement of legal proceedings, must be complied with by the third party before the insurer is obliged under the Ordinance to satisfy the judgment.

In the Federal Court case of *New Zealand Insurance Co. Ltd. v. Sinnadorai* [1969] 1 MLJ 183, the late H.T. Ong CJ (Malaya), with whom Suffian FJ (as he then was) and Abdul Aziz J concurred, said on p. 185 with reference to s. 80(1) and 75(1)(b) of the Ordinance:

> In plain language this means that insurance cover is compulsory in respect of (a) **all third parties other than passengers** carried in the insured's vehicle and (b) **passengers** carried by the insured, either for hire or reward, that is to say, in public service vehicles, or by reason or in pursuance of a contract of employment. Passengers in private vehicles consequently do not come within the ambit of compulsory insurance. Up to this point there is no difference of opinion between Counsel on both sides. The real conflict is on the interpretation of the bracketed words in s. 80(1), 'being a liability covered by the terms of the policy'. Is such liability to be construed as synonymous and exegetical of 'such liability as is required to be covered by a policy under para. (b) of subsection (1) of s. 75?

The learned Chief Justice held that the word "being" did not mean "or" so as to extend the scope of the insurers' liability to a third party who, being a passenger in a private vehicle in that case, was disentitled from relying on s. 80(1) which confers statutory benefits to third parties in cases where third party cover is made compulsory.

Section 75(1) of the Ordinance is substantially the same as s. 145 of the English Road Traffic Act 1972, which has been drafted in a language that is clearer and simpler to understand. Section 145 of the English Act does not under subsection (3)(a) make cover for property damage compulsory but has made provisions for payment for emergency treatment under subsection (3)(b). Section 145 is worth noting and reads as follows:

> 145. Requirements in respect of policies of insurance (1) In order to comply with the requirement of this Part of this Act, a policy of insurance must satisfy the following conditions.
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> (2) The policy must be issued by an authorised insurer, that is to say, a person or body of persons carrying on motor vehicle insurance business in Great Britain.
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> (3) Subject to subsection (4) below, the policy:
>
> (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability of which may be incurred by him or them in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road; and
>
> (b) must also insure him or them in respect of any liability which may be incurred by him or them under the provisions of this Part of this Act relating to payment for emergency treatment.
>
> (4) The policy shall not, by virtue of subsection (3)(a) above, be required to cover:
>
> (a) liability in respect of the death, arising out of and in the course of his employment, of a person in the employment, of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> (b) any contractual liability.

As s. 80(1) is *in pari materia* with s. 10(1) of the English Road Traffic Act of 1934, my views are fortified by a statement of law, applicable to the present appeal, appearing in para. 769, p. 375, of Vol. 22 of *Halsbury's Law of England* (3rd Edn.), reading as follows:

> 769. Judgments required to be satisfied.
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> The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person failing within the limited class of third parties whose bodily injury or death is required to be covered a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy.

Thus in the present appeal the third party has not obtained a judgment against the insured for bodily injury. Since the third party is alive, it is obvious that no judgment can be obtained against the insured for death. As stated before, the judgment obtained by the insured is in respect of property damage only. In the circumstances, it is clear that the third party, by virtue of the provisions of ss. 75(1)(b) and 80(1) of the Ordinance, has no statutory rights to sue the insurers direct for recovery of the judgment sum. The third party at common law

may only sue the insured for tort or breach of duty of care, if any, and, although the insurers have undertaken to indemnify the insured, the third party in the present appeal has no right of action against them.

The contention by learned Counsel for the third party that there is liability on the insurers to pay the judgment sum must fail. The learned Magistrate erred in law in holding that the insurers are contractually liable to the judgment sum where it is clear from the record that there is no privity of contract between the insurers and the third party. The learned Magistrate erroneously equated the insurer's undertaking to indemnify the insured with a contract or undertaking to indemnify or pay the third party for property damage sustained by him.

I therefore allow the appeal and set aside the judgment and order of the learned Magistrate, with costs here and in the Court below.

Also found at [1982] CLJ 260